ARAB-MALAYSIAN BANK BHD

v.

WANDERPAK MANUFACTURING SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL SUIT NO: 22-501-1998]
25 OCTOBER 2001

CIVIL PROCEDURE: *Summary judgment - Triable issues - Banking facilities - Guarantee - Guarantor sued as principal debtor - Whether there was change in status from guarantor to principal debtor - Whether by itself raising a triable issue - Failure to resort to security under facilities - Whether also a triable issue - Rules of High Court 1980, O. 14 - Contracts Act 1950, s. 94*

The plaintiff had granted certain banking facilities ('the facilities') to the principal borrower upon the security of a charge and a debenture, as well as a guarantee executed by the 2nd defendant ('the Guarantee'). It was not in dispute that under the terms of the Guarantee, particularly the 'principal debtor clause' therein, the 2nd defendant was not only a guarantor for the facilities but was also deemed a principal debtor thereof. Upon the borrower's default, the plaintiff sued the 2nd defendant in his capacity as a principal debtor and subsequently applied for and obtained summary judgment against him. The 2nd defendant appealed and argued that summary judgment was wrongly granted as triable issues had arisen, *inter alia* by the need to construe the proper effect of the 'principal debtor clause' and by the plaintiff's failure to plead and enforce the security of the charge and the debenture herein.

Held:

[1] This was not a fit and proper case for summary disposal for the reason that there are triable issues which merited the rigours of a full trial. (p 37 g)

[2] It is true as propounded in *Lee Ah Chor v. Southern Bank Berhad* that parties are bound by their pleadings and that issues which have not been raised therein could not be argued upon. Nevertheless, the principle propounded was based on a full trial conducted. In the factual matrix at hand, in the context of summary judgment application, a defendant is not in any way restricted from raising an issue or question not pleaded as the wording that "a defendant may show cause ... by affidavit or otherwise" is self-explanatory. (p 38 b)

[3] The debenture herein was alluded to by the plaintiff in their submission at the hearing before the registrar. That being so, the defendant ought not to be shut out to investigate further on the question of the security, for instance as to whether it has crystallized, and if so, whether there has been realization thereof. These are pertinent questions that ought to be investigated by way of a full hearing, bearing in mind that under s. 94 of the Contracts Act 1950 a surety is entitled to the benefit of the creditor's security. (p 38 c)

[4] The principal debtor clause relied upon by the plaintiff to impute liability on the 2nd defendant has given rise to an issue that needed to be investigated upon, namely, whether the effect thereof would be to change the status of the guarantor to that of a principal debtor. The determination of the issue is crucial because its effect on the change of status from a guarantor to that of a principal debtor would tantamount to offending the principle that a guarantor cannot guarantee his own debt. (p 38 f-g)

[4a] More importantly the clause needed to be construed so as to determine: (i) whether the 2nd defendant, as deemed principal debtor, was barred from raising the defences available to a guarantor; (ii) whether it had effected a change in status so as to subject the guarantor to all the restrictions imposed in the principal agreement between the creditor and the principal debtor; and (iii) whether the 2nd defendant, as deemed principal debtor, would be deprived of his rights of subrogation considering that, as principal debtor, he cannot be subrogated over his own securities. (p 39 c-f)

[Appeal allowed.]

Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Brown Bros Motor Lease Canada Ltd v. Ganapathi [1983] 139 DLR (3d) 227 ***(refd)***

Development & Commercial Bank Bhd v. Almas Motors Corporation (M) Sdn Bhd & Ors [1989] 1 CLJ 915; [1989] 1 CLJ (Rep) 502 HC ***(foll)***

Harrison v. Bottenheim [1878] 26 WR 362 ***(refd)***

Heald & Anor v. O'Connor [1971] 1 WLR 497 ***(refd)***

Kanagasabai Satkuru v. United Malayan Banking Corporation Bhd [1981] 2 MLJ 23 FC ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(dist)***

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 226 ***(refd)***

United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 92, 94
Rules of the High Court 1980, O. 14

For the plaintiff - M Pathmanathan; M Pathmanathan & Co
For the defendant - CM Yeo; M/s CM Yeo & Assoc

Reported by WA Sharif

JUDGMENT

Syed Ahmad Helmy JC:

By encl. 58 the 2nd defendant herein appeals against the decision of the senior assistant registrar given on 25 August 2000 allowing the plaintiff's application to sign final judgment pursuant to O. 14 of the Rules of the High Court 1980.

The action herein against the 2nd defendant is in his capacity as a guarantor pursuant to the guarantee dated 28 August 1995. The 2nd defendant's solicitor in his written submission advanced several arguments in support of his contention that there are triable issues which necessitate the issues to be tried by way of full trial and not summarily. Amongst the issues advanced was the failure of plaintiff to plead the security by way of charge & debenture in the statement of claim; failure by plaintiff to enforce the security aforesaid; negligence on the part of plaintiff in realizing the securities which consequently caused loss to the 2nd defendant as he has been deprived of the benefit of the security.

The plaintiff submitted to the contrary and maintained that the case is a fit and proper one for summary disposal as the plaintiff's claim is pivoted on the opening clause of the letter of guarantee where the 2nd defendant is sued in the capacity as principal debtor and not as surety to the banking facilities granted by the plaintiff to the principal borrower. As regards the 2nd defendant's argument of failure to plead the security of the charge & debenture in the statement of claim and the failure and/or negligence in realizing same the plaintiff maintained that same does not amount to triable issues as the plaintiff not only has an unfettered and exclusive right to choose which action to proceed with – *Bank Bumiputra Malaysia Bhd v. Esah binti Abdul Ghani* [1986] 2 CLJ 409; [1985] CLJ (Rep) 41 but also the guarantee document, in particular cl. 5 and 17 thereof contractually empowers plaintiff to enforce the guarantee without first recourse to other securities; the 2nd defendant is also

estopped from raising the issue of the non-pleading of the charge and debenture instrument as same not being pleaded in both the statement of claim and defence cannot be raised as an issue as parties are bound by their pleadings and issues not raised in pleadings cannot be argued – *Lee Ah Chor v. Southern Bank Berhad* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC; *Kanagasabai Satkuru v. United Malayan Banking Corporation Berhad* [1981] 2 MLJ 23.

The appeal herein being an appeal against an O. 14 application for summary judgment the burden imposed on the 2nd defendant is centred on raising "an issue or question which ought to be tried or that there ought for some reason to be a trial of that claim or part."

In determining whether the 2nd defendant has discharged the burden imposed "the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendant having a real or *bona fide* defence" – *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 226.

In an O. 14 application the defendant may advance numerous arguments to establish triable issues – even if most of the arguments raised is not meritorious so long as one of the issues raised requires investigation the defendant ought not to be shut out from having the issue fully investigated by the court. This is in accord with the principle established in *Harrison v. Bottenheim* [1878] 26 WR 362 which was adopted by Mohamed Dzaiddin FCJ (as His Lordship then was) in *United Merchant Finance Berhad v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 where Bramwell LJ stated at p. 363: "though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within O. 14, and should not be pursued without his being allowed to defend." Though his Lordship Mohamed Dzaiddin was construing the words "there ought for some reason to be a trial" nevertheless the point is that so long as the defendant raises a triable issue he should be given all available opportunity to prosecute the issue raised though the medium of a full trial.

From the evidence adduced and the arguments advanced I am of the considered view that this is not a fit and proper case for summary disposal for the reason that there are triable issues as hereafter appearing which merited the rigours of a full trial.

On the question of whether the failure to plead the charge and debenture in the pleadings debars the defendant from alluding to it, though it is true that the parties are bound by their pleadings and any issue not raised therein cannot be argued as propounded by the Supreme Court decision of *Lee Ah Chor v. Southern Bank Berhad* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 nevertheless the principle propounded was based on a full trial conducted. In the factual matrix at hand, in the context of summary judgment application a defendant is not in any way restricted from raising an issue or question not pleaded as the wording that "a defendant may show cause ... by affidavit or otherwise" is self-explanatory. The debenture herein was alluded to by the plaintiff themselves in their written submission at the hearing before the senior assistant registrar. Since it was alluded to by the plaintiff surely the defendant ought not to be shut out to investigate further on the question of the security, whether it has crystallized and if so whether there has been realization and the amount thereof. These are pertinent questions that ought to be investigated by way of a full trial bearing in mind that under s. 94 of the Contracts Act 1950 a surety is entitled to the benefit of the creditor's securities.

The effect of s. 94 Contracts Act 1950 was adverted to in the case of *Development & Commercial Bank Bhd v. Almas Motors Corporation (M) Sdn Bhd & Or*s [1989] 1 CLJ 915; [1989] 1 CLJ (Rep) 502 where the court in relation to a debenture which was not caused to be crystallized held that whether that amounted to negligence or a breach of implied warranty or duty, and whether or not the third defendant had bargained away his rights preserved by s. 92 & 94 of the Contracts Act 1950 and whether as a result thereof there had been an impairment of the security all amounted to triable issues.

Again an issue arises on the principal debtor clause relied upon by plaintiff to impute liability on the 2nd defendant. The issue that needs to be investigated under a principal debtor clause is whether the effect thereof would be to change the status of the guarantor to that of a principal debtor. The determination of the issue is crucial because the effect on the change of status from that of a guarantor to a principal debtor tantamounts to offending the principle that a guarantor cannot guarantee his own debts. Locke J in the Canadian case of *Brown Bros Motor Lease Canada Ltd v. Ganapathi* [1983] 139 DLR (3d) 227 in construing the principal debtor clause, had this to say:

> The clause has given me much trouble but also I adopt the view of Wilde C.J. and say that even the very specific words "I shall be and shall be deemed to be a principal debtor and not a surety" were not intended to alter the basic intention of the parties i.e. Ganapathi was intended to be a guarantor alone.

> Among other reasons if he was ever intended to be the principal debtor, I do not see why he was not so named as a co-debtor in the body of the agreement, nor do I see the need for any guarantee at all ...

Again in the English case of *Heald & Anor v. O'Connor* [1971] 1 WLR 497 it was held that the clause cannot convert what is in reality a guarantee into an indemnity. Fisher J stated at p. 503:

> The only straw for the plaintiff to chitch is the phrase "as a primary obligor and not merely as surety" but that in my judgment, is merely part of the common form of provision to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity.

Further and more importantly in construing the principal debtor clause whether it would debar the 2nd defendant from raising all available defences available to guarantors just because they are deemed to be principal debtor. Implicit in the question as to the effect as to the change of status is whether the 2nd defendant as deemed principal debtors *vis-a-vis* the plaintiff is entitled to avail himself of raising the question of obtaining the best price possible as laid down in the Supreme Court case of *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206.

Again in ascertaining the principal debtor clause and whether or not there is a consequential change in status has to be decided against the provision of s. 81 which equates the extent of surety's liability to that of the principal debtor. Whether or not it effects a change in status so as to subject the guarantor to all the restrictions imposed in the principal agreement between the creditor and the principal debtor would require investigation. The determination aforesaid would also involve the determination on whether the 2nd defendant as deemed principal debtor would be deprived of his rights of subrogation because as principal debtor he cannot be subrogated over his own securities.

For the reasons adumbrated above and in the light of the several issues raised I accordingly allowed the 2nd defendant's appeal in encl. 58 with costs.